Supreme Court, U.S.
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No._____

In the
Supreme Court of the United States

JANICE GRAY, Petitioner

-v-

ENTERGY OPERATIONS, INC., Respondent

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JANICE GRAY, *Pro Se*
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31 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals was incorrect in upholding a summary judgment.

2. Whether the United States Court of Appeals violated petitioner's constitutional rights by denying trial by jury as provided in the seventh amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners

Janice Gray

Respondents

Entergy Operations, Inc.

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The United States Court of Appeals for the Fifth Circuit issued its unpublished opinion affirming the United States District Court for the Western District of Mississippi upon Janice Gray's case (*Gray v. Entergy, Operations, Inc.*). The United States District Court for the District of Western Mississippi ordered entry of the final judgment in Gray v. Entergy, Inc. on March 2, 2000.

JURISDICTION

Jurisdiction of this Court is invoked under Section 1331, 1367, 2201, 2202 Title 28, United States Code 42 U.S.C.A. 1981,1988, Section 2000 and 12101,Title VII of the 1964 Civil Rights Acts as an appeal from a final judgment in the United States District Court for the Southern District of Mississippi, Jackson Division. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

The United States District Court issued its summary judgment on March 2, 2000.

The judgment of the district court in all respects was affirmed by the United States Court of Appeals for the Fifth Circuit on October 11, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

This case (5:99CV62BN) began February 28, 1998 as 5:98cv60Brs, as a potential class action lawsuit as a result of racial discrimination and harassment committed by Entergy Operations, Inc. against the African Americans under its employment and control.

The complainant representing the victims and others similarly situated were William Boykin, Janice Gray, Betty Boykin, Ellen Watts, Greateal Green, Marie Hayes, Bessie Washington and Tremecha Rankins. The judge was David Bramlette, Appellant's Attorney Carol Rhodes, defense EOI.

On June 15, 1998, during a case management conference, Judge James Sumner told the Appellants and their counsel that he was not going to approve or certify this suit as a class. And if it was pursued, he was going to throw the entire suit out of court, without a chance for individual claims after the decision. At the same time, actually a month prior May 15, 1998, a ruling came down from the fifth circuit discouraging a class action lawsuit. The decision by the 5th circuit on the lawsuit Allison v. citgo Petroleum Corp stated in affect that a corporation could not be fined for punitive damages in a class action lawsuit, but only for promotions and back pay. This ruling was strangely limited to class action racial discrimination lawsuits and only applied to proceedings in the fifth circuit.

What this effectively did was to discourage any counsel from pursuing a class action lawsuit of this type because of questionable monetary gains by a law firm.

In order to retain Attorney Rhodes, a notice was sent to Judge David Bramlette on July 13, 1998 to withdraw application in effect for a class action lawsuit against EOI. Ten days later July 23, 1998, Judge Bramlette recused himself from this trial under 28 U.S.C. 455; six months after the lawsuit was filed.

Shortly after his recusal, Judge Bramlette was accused of conflict of interest involving another complainant in another case against defendant, reference judicial misconduct complaint 99-05-372-0149, 5th Cir. of App. Docket 00-60046. (Boykin v. Entergy)

On August 11, 1998, Judge William Barbour replaced Judge David Bramlette as the residing judge and issued an order for the eight cases to resume as individual district cases.

The cases were divided into separate cases. The Appellee, through the courts, completely separated the Appellants as a commonality of complaint, and then through the court's approval, treated them as one when it was to the advantage of the Appellees. This was done on March 15, 1999. There was a motion to sever and it was granted by the district court. The clerk of court was directed by Judge Barbour to assign each of the "related" cases an individual number.

It should be noted that earlier Judge James Sumner categorically in conversation stated, these cases were dissimilar and could not qualify as a class. Yet a year later, they are related cases. The cases that survived the manipulation of the district court and EOI are William Boykin v. EOI CA 5:99Cv29BN, Betty Boykin v. EOI CA 5:99 CV 60 Bn, Bessie Washington v. EOI CA 5:99 Cv61 Bn, Janice Gray v. EOI CA 5:99 CV62 Bn, Ellen Watts

v. EOI CA 5:99 CV63 Bn, Marie Hayes v. EOI CA 5:99 CV64 Bn were dismissed on the same day for the same reasons based on one affidavit from a company EOI official.

This dismissal was performed by Judge William Barbour despite the facts and overwhelming evidence and depositions to the contrary.

Janice Gray, Complainant in CA 5:99 CV 62 BN, Appellant in 00-60350, is in this Court because there has been a serious act of injustice. The district court chose to rule for a dismissal and ignore all evidence and depositions presented. This Dismissal of Claims was ordered and signed by Judge William Barbour on March 2, 2000.

The appellate court ruled against the appellant/petitioner and affirmed the lower court's decision.

Petitioner strongly disagrees. A review of this judgment by the 5th Circuit of Appeals is sought.

A proof of service is sent to Defendant's counsel, Wise Carter Caraway Child.

ARGUMENT FOR GRANTING WRIT

A United States Court of Appeals has entered a decision in conflict with the decisions of other United States Court of Appeals on the same important matter.

The United States Court of Appeals has decided an important question of law that is in conflict with standing federal and constitutional law.

The Fifth Circuit Court of Appeals is erroneous in its affirming the District Court's decision. Its decision is in conflict with the majority of the circuit courts and in direct conflict with the United States Constitution.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS WAS INCORRECT IN UPHOLDING SUMMARY JUDGMENT.

The Court found that Appellant established a prima facie case of racial discrimination regarding her promotion claim. (Opinion, p. 9]. The Court also found that the Appellant's proof failed for lack of a statistical correlation and lack of evidence that she was qualified for the high-skilled jobs allegedly held by whites. The Court also found that the Appellee articulated two nondiscriminatory reasons for not promoting plaintiff - (1) the white woman who was promoted

was more qualified, and (2) she was known to be compatible with the person she would be working for. However, the facts show that the appellee has given inconsistent testimony on the proffered reasons.

In 1978 through 1979 Appellant was hired as a clerk typist and have had the following title changes

1) Night shift Coordinator 1979-1981,
2) General Administrative Coordinator, changed to Office Services Coordinator, 1981-1989,
3) Assistant Office Services I 1990-1997,
4) Office Services Assistant I 1998-Present.

These were not promotions.

On or about November 1996, Appellant applied for the position of Site Administrative Program Coordinator. The qualifications for the position were that the applicant possess (1) a high school diploma, or its equivalent and (2) ten years of nuclear experience. At the time of the subject job posting, Appellant possessed a B. S. Degree from Alcorn State University. She also had 19 years of nuclear experience. Alleging that the requirement of ten years nuclear experience had severely limited its qualified applicant pool, EOI re-advertised the Site Administrative Program Coordinator position without selecting a qualified applicant from the first applicant pool.[1] Surprisingly, the qualifications of the re-advertised job posting had been reduced to allow for ten years of nuclear or administrative experience.

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[1] James M. Cooley testified that only two or three more applicants applied after the Site Administrative Program Coordinator position was re-advertised.

Appellant, again, applied for the position and continued to meet the qualifications but, was rejected. Another EOI employee, Karen Rucker, a white female, was hired instead. Ms. Rucker testified that she received her formal education in England and received the English equivalent to a high school diploma. (See Rucker Dep., pps. 28-29). There was no proof of Ms. Rucker's record of a high school equivalent present in her personnel file - a prerequisite of a qualified applicant. [2]

EOI's sole purpose in changing the job qualifications of Site Administrative Program Coordinator was to meet the qualifications believed to be possessed by Karen Rucker.[3]

Even after the re-advertisement, Appellant clearly possessed more than the minimal qualifications for the job and there was no record proof that Ms. Rucker possessed a high school diploma, or its equivalent - minimum qualifications for the job. In spite of these facts, Appellant was rejected for the promotion in favor of Karen Rucker, an unqualified white female. The fact that Appellant possessed seniority, more experience and more education points to the impetus for the defendant's actions as collective racial animus against Appellant.

Ms. Jeff Braswell testified that job qualifications would be specifically tailored to meet the unique qualifications of a particular employee whom Mike Bakarich, a former Grand Gulf

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[2]Mary See testified that proof of job qualifications must be present in the applicant's file to her hired into a posted position. Karen Rucker was first hired as an EOI employee by Mike Bakarich.

[3]Karen Rucker did not possess ten years of nuclear experience nor a high school diploma or its equivalent in her personnel file.

manager, wished to hire into a certain position. (See Braswell Dep., p. 17). And that Mike Bakarich filled a vacant position with a Aprotegee without ever advertising according to company policy. (See Braswell Dep., p. 48). The fact that a white supervisor failed to post job vacancies could only discourage Appellant from applying for posted vacancies to a greater degree than white employees. White employees would generally be the beneficiaries of inside information through the grapevine.

Apparently, this policy was company wide at EOI and continued even after Mike Bakarich was moved to another position within the company.

Appellant also lost promotional advancement because the defendant failed to advertise job vacancies and/or failed to promote the most qualified applicant by filling vacancies with select employees.

Jeff Braswell, Depo. Pp. 58-59, shows that the secretarial positions are the higher paid positions, although the clerical positions perform the same duties. The secretarial positions are primarily held by whites and the clerical positions are primarily held by blacks. Pay raises for whites are generally higher than the merit pay raises for blacks. Ron Husbands, Appellee witness, testified that the merit pay increases are arbitrarily and subjectively determined by the managers and supervisors. Husbands testified that Entergy does not have any objective standards on merit pay increases. Salary increases based on subjective determinations and procedures are inherently suspect. See, *Pittman v. Hattiesburg Municipal Separate School District*, 644 F. 2d 1071, 1074 (5th Cir. 1981); *Uviedo v. Steves Sash & Door Co.*, 738 F. 2d 1425, 1431 (5th Cir. 1984), cert. denied, 474 U. S. 1054, 106 S. Ct. 791, 88 L. Ed. 2d 769 (1986). AElusive, purely subjective standards must give way to objectivity if statistical indicia of discrimination are to be refuted.@ *Brown v. Gaston County Dyeing Machine Company*, 457 F. 2d 1377, 1382 (4th Cir. 1972). The lack of objective guidelines is a badge of

discrimination. *Brown v. Gaston County Dyeing Machine Company*, supra, at 1383. To establish a prima facie case of wage discrimination, a plaintiff must prove that "(1) [he] is a member of a protected class, and (2) that [he] is paid less than a nonmember for work requiring substantially the same responsibility" Id. Appellant has established that she is black, and that she has performed and performs substantially the same responsibility as white exempt employees and secretaries, yet receive less pay in spite of her qualifications and experience. The Appellee's vague assertions that pay is based on background, skills and subjective evaluations by supervisors and managers is not enough to rebut Appellant's prima facie pay discrimination claim. See, *Lees v. The Case-Hoyt Corp.*, 779 F. Supp. 717, 725 (W. D. N. Y. 1991). In *Lees*, supra, at 725, the Court held that:

> [d]efendant has offered nothing to show that plaintiff's salary was tied to an unsatisfactory job performance or some other identifiable factor. Without such evidence produced plaintiff's prima facie case of wage discrimination stands unrebutted. Consequently, defendant's motion for summary judgment with respect to the claim of wage discrimination is denied.

Exhibits attached to Appellant's Response to the Appellee's Summary Judgment Motion show that 56 blacks and 10 whites work in clerical positions for Entergy (including at Grand Gulf), four black and four white secretaries, 25 black and six white laborers, six black and 53 white mechanics, four black and 89 white electricians, three black and 84 white operators, three black and 76 white technical specialists, 37 black and 637 white professionals, six black and 30 white supervisors, one black and 15 white superintendents, and no black and eight white managers. This evidence shows blacks are concentrated in the unskilled and minimally skilled jobs whereas whites are in the professional and skilled jobs at Entergy. "When job classifications are as segregated as they are in this company", it is an

indication of discrimination. *Brown v. Gaston County Dyeing Machine Co.*, supra, at 1383.

In a private, non-class action complaint under Title VII charging racial discrimination, the complainant has the burden of establishing a prima facie case, which she can satisfy by showing that (1) she belongs to a racial minority, (2) that she applied and was qualified for a job the employer was trying to fill, (3) though qualified, she was rejected, and (4) thereafter the employer continued to seek applicants with complainant's qualifications.

James M. Cooley listed merit increases for Appellant from 1990 to 1999 yet showed no merit increases of whites in comparison to Appellant for the same time periods when in actuality, whites received more money in merit increases than blacks. Contrary to James M. Cooley's list, Appellant received zero merit for the year 1991 [see excerpt A]. This one year comes to mind, there could be others.

James M. Cooley swore in his affidavit that he has knowledge of human resource activities at Grand Gulf and Donald Hintz was never involved in any of the individual pay or promotion decisions regarding appellant, yet payroll authorizations were submitted to the president for approval.

James M. Cooley gave testimony of the details of the employee performance and potential ranking system used by EOI.

Cooley stated "at least ten percent of the employees had to be ranked a nine." [See Cooley's Affidavit, p. 3]. He failed to mention ranking as it relates to Appellant. Appellant, an exempt employee, was ranked in the classification with engineers and technical specialists. Ultimately, Appellant was informed by EOI she ranked 9 and was coerced to leave the company.

James M. Cooley also swore that Appellant's salary and promotion opportunities at Grand Gulf were not adversely affected by any of EOI's changes to job titles affecting clerical employees, or her position in particular. Apparently James M. Cooley is not as familiar with human resources activities at Grand Gulf as testified.

In 1978 through 1979 Appellant was hired as a clerk typist and have had the following title changes

1) Night shift Coordinator 1979-1981,
2) General Administrative Coordinator, changed to Office Services Coordinator, 1981-1989,
3) Assistant Office Services I 1990-1997,
4) Office Services Assistant I 1998-Present.

These were not promotions.

Historically, title changes were common with positions held by blacks in the organization managed by Mike Bakarich and occurred often; mostly with no increase in pay but sometimes were executed in conjunction with an annual merit increase. This action removed any opportunities and stagnated viable pay increases by removing Appellant's seniority from the equation of career advancement and progression. John J. Farren, a Human Resources Director, testified in the deposition of Ellen Watts that the determination by managers of salary recommendations to the human resources department was arbitrary.

He testified:

Q. So if those salaries have been discriminatorily determined prior to 1992, then the same discriminatory salary would have been encoded into the electronic personnel file in 1992?

A. The same salary-

Q. Same salary.

A. -that it had before would be-

(WITNESS NODDING HEAD).

[Dep. Of John J. Farren, pp. 68-69]

In short, Appellant was paid less money, as a starting salary with EOI, than whites who were hired in similar positions with less education and experience.

James M. Cooley, Human Resources, swore in his affidavit to Marie Hayes that the majority of EOI's performance appraisal forms calls for objective evaluations as to the employee's performance. To the contrary, Ron Husbands, EOI Manager, testified that the merit pay increases are arbitrarily and subjectively determined by the managers and supervisors. Husbands testified that Entergy does not have any objective standards on merit pay increases. Salary increases based on subjective determinations and procedures are inherently suspect. See, *Pittman v. Hattiesburg Municipal Separate School District*, 633 F 2d 1071, 1074 (5th Cir. 1981); *Uviedo v. Steves Sash & Door Co.*, 738 F. 2d 1425, 1431 (5th Cir. 1984), cert. denied, 474 U. S. 1054, 106 S. Ct. 791, 88 L. Ed. 2d 769 (1986). "Elusive, purely subjective standards must give way to objectivity if statistical indicia of discrimination are to be refuted." *Brown v. Gaston County Dyeing Machine Company*, 457 F. 2d 1377, 1382 (4th Cir. 1972).

The lack of objective guidelines is a badge of discrimination. *Brown v. Gaston County Dyeing Machine Co.*, supra, at 1382.

There are record facts which, if believed by the ultimate trier of fact[4], strongly dispute the trustworthiness of the appellee's reasons proffered for not promoting appellant. Those facts also show that the appellee has given inconsistent testimony on the proffered reasons.

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[4]In deciding a summary judgment motion in an employment discrimination case, "a judge may not assess the credibility of witnesses." Stewart v. RCA Corp., 790 F. 2d 624, 628 (7th Cir. 1986). The judge "has no similar right to decide which evidentiary materials are the best ones for resolving a disputed question of fact; the judge may not resolve the dispute at all."

Appellee presents no pro-offered reason for Appellant's disparate wages and promotions in comparison to white employees. The Appellant's employment records, along with the employees that have been promoted were presented to the court. The court chose to ignore these records which clearly shows Appellant more qualified than the white employees who were paid more and promoted ahead of her.

The Appellant included as evidence statistics as to the Entergy's refusal to promote Appellant and in this case conformed to a general pattern of discrimination against African Americans. Although the Appellee' s statistics were not sufficient to demonstrate conclusively that its actions were not discriminately motivated, the district court did not consider the racial mix of the work force when making their determination as to motivation and the court of appeals should give consideration to such proof in further proceedings. *Furnco Construction v Waters, 438 U.S. 567 (1978) p. 579-580.*

The Appellant has introduced evidence from the personnel director at Entergy who confirms the subjective rather than objective criterion which has little weight in rebutting charges of discrimination. The Appellee did little to present non-discriminating reasons for its actions. It can be discerned that because no legitimate reasons were offered for Appellant's rejection for promotion and less wages by Appellee, there was some reason, based on Appellee's decision on impermissible considerations such as race.

The Appellant to survive the Appellee's motion, need only present evidence from which a jury might return a verdict in favor of Appellant. If Appellant does so there is a genuine issue of fact that requires a trial.

The district court disregarded critical evidence favorable to the Appellant - namely the evidence supporting Appellant's prima facie case and disregarding Appellee's almost lack of explanation of why white employees were promoted over Appellant, who is black.

"[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to [477 US. 242, 249] trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." 391 U.S., at 288-289.

The holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes, 398 U.S., at 158-159*. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co., 334 U.S. 249 (1948)*.

The trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West, 505 U.S. 277, 296 (1992)*; see also *Wilson v. United States, 162 U.S. 613, 620-621 (1896)*; 2 J. Wigmore, Evidence 278(2), p. 133 (j. Chadbourn rev. ed. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Cf. *Furnco Constr. Corp. v. Waters, 438 U.S. 567, 177 (1978)*.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate interferences from the facts are jury functions, not those of a judge." *Liberty Lobby, supra, at 255*. Thus although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and un-impeached, at least to the extent that evidence comes from disinterested witnesses." Id., at 300.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS BY DENYING TRIAL BY JURY AS PROVIDED IN THE SEVENTH AMENDMENT OF THE UNITED STATES CONSITUTION.

In the suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be otherwise re-examined in any court of the United States, than according to the rule of the common law.

The framers of the Constitution considered the right to jury trial extremely important. In the Sixth Amendment, they provided for jury trials in criminal cases. In the Seventh Amendment, they provided for such trials in civil suits where the amount contested exceeds $20. The amendment applies to federal courts and state institutions also call for jury trials in civil cases.

Traditionally, the Supreme Court has treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted." The right was to "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the

facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."

The Amendment has for its primary purpose the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."

As in Rule 50 of Federal Rule of Civil Procedures cited in Reeves, v. Sanderson No. 99-536, the court should review all evidence in the record.

The court seemingly disallowed before-stated evidence and granted summary judgment. The Court of Appeals as well as the District Court impermissibly substituted its judgment weighed on other factors, instead of the facts, as furnished to the courts.

CONCLUSION

The Defendant uses many subjective reasons such as, 'comfortable with', 'easy to work with', etc. as a pretext for non-discrimination. There is no evidence of objective rationale. There is no substance.

The district court erred in not citing defendant for failing to submit records of plaintiff. James M. Cooley's affidavit indicates that it is predicated on a review of documents in Ms. Gray's personnel file. The defendants did not disclose those documents to the plaintiff in pre-discovery disclosure or at any time during this litigation.

The Court of Appeals and the District Court have consistently evaded the evidence of discrimination and retaliation experienced in the work place especially when race is under consideration The petitioner was denied equal protection under the law.

The Court of Appeals consistently ignores Title VII complaints when race is an issue.

This court should enforce the provisions of Title VII and the Seventh Amendment of the United States Constitution.

Respectfully submitted,

Janice Gray

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DATE: 2/27/01

U. S. COURT OF APPEALS
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NOV 29 2000
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-60350
Summary Calendar

JANICE GRAY, Plaintiff-Appellant

v.

ENTERGY OPERATION, INC.; DON HINTZ; MIKE BAKARICH; JOSEPH HAGAN; and MARY SEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 5:99-CV-62-BN

Before KING, Chief Judge, and SMITH and PARKER, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Janice Gray appeals from the district court's grant of summary judgment in favor of Defendants-Appellees, Entergy operation, Inc.; Don Hintz, Chief Executive Officer of Entergy Operation, Inc.; Mike Bakarich; Joseph Hagan; and Mary See. For the following reasons, we AFFIRM.

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

I. FACTUAL AND PROCEDURAL BACKGROUND

Since 1977, Janice Gray, an African American female, has been employed at the Grand Gulf Nuclear Power Station in Port Gibson, Mississippi (the "Grand Gulf facility"). On March 12, 1999, Gray filed suit against her employer Entergy Operations, Inc. (EOI) and several management officials under 42 U.S.C. § 1981, claiming discrimination on the basis of race. Her suit included the following three causes of action: Failure to promote, payment of disparate wages, and establishment of discriminatory working conditions.

On January 7, 200, defendants filed a motion for summary judgment. In response, Gray requested a voluntary dismissal of several claims, pursuant to Rule 41 of the Federal Rules of Civil Procedure. She also filed a Motion to Strike Affidavit of James M. Cooley, the Manager of Employee Relations at the Grand Gulf facility. The district court, on March 2, 2000, denied Gray's motion to strike, granted her Rule 41 motion, and awarded defendants summary judgment on the remaining claims. After the district court granted Gray's Rule 41 motion, four claims remained: discriminatory promotion claim for the 1996 Site Administrative Programs Coordinator position; discriminatory promotion claim for the 1999 Procurement Specialist III position; disparate wages claim; and discriminatory working conditions claim.

On March 16, 2000, Gray filed a Motion to Amend and to Make Additional Findings of Fact and Motion to Amend Opinions and Judgment ('Rule 51 and 59(e) Motion"). The district court denied this motion on April 16, 2000. Gray then filed a timely notice of appeal from this decision.[1]

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[1] Gray asserts in her brief on appeal that Cooley's affidavit was inaccurate. She does not argue that the affidavit should have been stricken on this basis; rather, it appears that she is attemptying to demonstrate the existence of genuine issues of material fact. Thus, we address her arguments regarding Cooley's affidavit in the context of her discrimination claims. See infra Section III.

II. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court. See Burch v. City of Nacogdoches, 174 F.3d 615, 618 (5th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Cv. P. 56(c); see also Celotex Corp. V. Catrett, 477 U. S. 317. 322-23)1086). "If the moving party meets the initial burden of showing there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000) (internal quotations and citation omitted). Doubts are to be resolved in favor of the nonmoving party, and any reasonable inferences are to be drawn in favor of that party. See Burch, 174 F.3d at 619.

III. DISCRIMINATION CLAIMS

A plaintiff can prove a claim of intentional discrimination by either direct or circumstantial evidence. Absent direct evidence of discriminatory intent, as is typically the case, proof via circumstantial evidence is accomplished using the framework set forth in the seminal case of McDonnel Douglas Corp. V. Green, 411 U.S. 792 (1973).[2] First, the plaintiff must establish a prima facie case of

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[2] Gray is asserting causes of action under 42 U.S.C. § 1981. Because "[c]laims of intentional discrimination brought under Title VII and Section 1981 require the same proof to establish liability," we will examine Gray's § 1981 claims under the well established title VII rubric of analysis. See Byers v. Dallas Morning News, Inc., 209 F.3d 419, 422 n.1 (5th Cir. 2000); see also Lawrence v. University of Tex. Med. Branch at Galveston, 163 F.3d 309, 311 (5th Cir. 1999) ("Employment discrimination claims brought under [§ 1981] . . . are analyzed under the evidentiary framework . . . [of] Title VII.").

discrimination. See Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2106 (2000). Second, the employer must respond with a legitimate, nondiscriminatory reason for its decision. See McDonnell Douglas, 411 US> at 802. This is only a burden of production, not persuasion, involving no credibility assessments. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981). Third, if the employer carries its burden, the inference of discrimination (created by the plaintiff's prima facie case) evaporates, and the plaintiff must prove intentional discrimination. See St. Mary's Honor Ctr. v Hicks, 509 U.S. 502, 511 (1993).

In making this showing, the plaintiff can rely on evidence that the employer's reasons were a pretext for unlawful discrimination. See McDonnell Douglas, 411 U.S. at 804. "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves, 120 S. Ct. at 2109. With this framework in mind, we proceed to analyze Gray's three discrimination claims.

A. Failure-to-Promote Claim

The district court granted defendants summary judgment on the regarding the Site Administrative Programs Coordinator position.[3] The court found that Gray established a prima facie case of discrimination and that defendants put forth nondiscriminatory reasons for their decision. The district court then concluded that Gray did not survive summary judgment because she failed to demonstrate that defendants' reasons were pretextual.

[3] The district court also ruled that Gray's remaining failure-to-promote claim (for the Procurement Specialist III position) violated Rule 8 of the Federal Rules of Civil Procedure because it was not contained in her original complaint. Gray is not contesting this issue on appeal.

To establish a prima facie case of discrimination for a promotion claim, the plaintiff must demonstrate that (1) the plaintiff is a member of a protected group; (2) the plaintiff was qualified for the position; (3) the plaintiff was subjected to an adverse employment action; and (4) the plaintiff was replaced by someone outside the protected class. See Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 404 (5th Cir. 1999). We agree with the district court that Gray established a prima facie case of discrimination: she is African American, a member of a racial minority; she was qualified for the position of Site Administrative Programs Coordinator (she had a at least a high school diploma and at least ten years of nuclear or administrative experience); she was not hired for the position; and Karen Rucker, a Caucasian female, was subsequently hired for the position. Defendants, in turn, have satisfied their burden of production and put forth two nondiscriminatory reasons for their employment decision: (1) Rucker was more qualified[4]; and (2) Rucker would be more compatible with her supervisor in that position, Site Vice-President Joseph Hagan.[5]

To demonstrate that defendants' reasons are pretexual, Gray makes several arguments. She first asserts that Rucker did not meet the minimum qualifications for the position because there was no proof of her high school diploma, or equivalent, in the personnel files. This is clearly rebutted by evidence in the record that Rucker's education certificates from England were in her personnel file, and a defense expert testified that her English certifications were the equivalent of a U. S. High school diploma.

Gray also points out that Rucker became eligible to apply only when the qualifications for the position were weakened (from ten years

[4] Defendants point to Rucker's fluency in several languages, as well as her oral and written presentations to high-level British government officials. As they were looking for an applicant with strong communication skills who could interact extensively with the public and who could influence management at all levels, defendants state that the three-person interview panel (which included the African-American human resources manager, Cooley) unanimously decided Rucker was the most qualified.

[5] Defendants state that Rucker has previously worked for Hagan as his secretary, and thus, Hagan was familiar with her abilities.

of nuclear experience to ten years of nuclear or administrative experience). The district court found that Gray admitted the qualifications were changed to match Rucker's qualifications in particular, not simply because Rucker was white. Furthermore, defendants bypassed other qualified white candidates who were eligible when the position was first posted. Thus, the re-posting of the position does not "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Reeves, 120 S. Ct., at 2106 (internal quotations and citation omitted) (quoting Burdine, 450 U. S. At 253).

In addition, Gray puts forth statements from the deposition of Jeff Braswell, and EOI retiree, that qualifications were \tailored to conform to the wishes of Mike Bakarich, a former manager at the Grand Gulf facility. Although defendants imply that statements not in connection with this promotion claim are irrelevant, the Supreme Court clearly stated in Reeves that pretext evidence should not be circumscribed as such. See id. At 2111. Thus, general remarks should not discounted because they were not made in direct reference to the employment decision; any evidence that could shed light on an employer's true motive must be taken into account. See id. However, in this case, the link between Braswell's statements and defendants' employment decision regarding the promotion are far too tenuous to establish pretext.[6]

Although Gray had more seniority with the company and education beyond high school, Rucker met the minimum qualifications

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[6] Braswell's testimony was in reference to another position; both Braswell and Bakarich were no longer longer employed at EOI during the interview process for this position; this position was to be under Hagan, not Bakarich; a three-person panel, which included an African-American manager, interviewed all candidates for this position; and Gray cites to no evidence in the record supporting her implication that Bakarich's preferences for his "proteges" were based on race (in fact, Braswell admitted that one of Bakarich's proteges was a black woman).

and had other qualities that defendants found appealing for the position. Gray has failed to create a genuine issue that defendant's proffered reasons are pretextual[7] and thus does not survive summary judgment on this claim.

B. Disparate Wage Claim

In this claim, Gray alleges that defendants paid her disproportionately less wages than similarly situated white employees. "To establish a prima facie case of discrimination respecting compensation a plaintiff must prove (1) that she is a member of a protected class, and (2) that she is paid less than a nonmember for work requiring substantially the same responsibility." (Uviedo v. Steves Sash & Door Co., 738 F.2d 1425, 1431 (5th Cir. 1984), cert. denied, 474 U. S. 1054 (1986).

While Gray satisfies the first prong because she is African-American, she fails to make a showing on the second prong of the test. She has not presented any evidence that she was paid less than white co-workers with similar responsibilities. Rather than providing specific information, Gray attempts to make her prima facie case via several general arguments. She points again to Jeff Braswell's deposition in which Braswell stated that secretaries are paid higher than clerks for performing the same duties. Braswell's statements are not sufficient to establish Gray's prima facie case because Braswell does not testify as to Gray's wages or the wages of employees with Gray's responsibilities.

Gray also asserts that Ron Husbands, manager of Entergy Services, Inc. (ESI), testified in his deposition that merit pay raises are arbitrarily and subjectively determined. This does not aid Gray in establish her prima facie case either because Husbands was testifying

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[7] Gray also makes other conclusory allegations that defendants failed to advertise positions and did not select the most qualified employees for the positions (choosing instead "select" employees). As these arguments are inadequately briefed, we do not consider them on appeal. See Trevino v. Johnson, 168 F.3d 173, 181 n.3 (5th cir. 1999).

in another case, Washington v. Entergy Operations, Inc.; he is a manager at ESI, not EOI; he was testifying as to how raises were allocated to ESI employees; and he did not provide any information as to Gray's wages or the wages of employees similarly situated to Gray.[8] As such, Gray has not created a genuine issue by pitting Husband's affidavit against Cooley's affidavit, in which Cooley stated that EOI performance appraisals are primarily objective.[9]

Because Gray has not demonstrated with particularity the identify of the similarly situated non-minority employees who were paid higher wages, we agree with the district court that Gray failed to establish a prima facie case on her disparate wages claim. Thus, summary judgment on this claim was appropriate.

A. Working Conditions Claim

Gray asserts that she "experienced [a] discriminatory work environment." She puts forth statistics that African Americans are concentrated in the unskilled and minimally skilled jobs at EOI, whereas whites are in the professional jobs. Gray's specific allegations regarding this claim are not entirely clear. If Gray is attempting to demonstrate disparate impact with these statistics, she does not state a claim cognizable under § 1981. While "[d]isparate impact claims . . . do not require proof of intent to discriminate," Munoz v. Orr, 200 F.3d 291, 299 (5th Cir. 2000), § 1981 claims necessarily entail proof of intentional discrimination. See General Bldg. Contractors Ass'n v. Pennsylvania, 458 U. S. 375, 391 (1982) ("[Section]1981 . . . can be violated only by purposeful discrimination.").

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[8] We also note that Gray mischaracterizes Husband's testimony as stating that wages at ESI were subjectively or arbitrarily determined. Husbands actually stated that while specific numerical percentages were not used, factors such as performance and potential guided their personnel determinations.

[9] Gray's reliance on the deposition of John J. Farren, the Grand Gulf facility's Human Resource Representative, is also of no avail. His testimony, examined in full context, does not support Gray's contention that salary determination are arbitrary.

Because Gray explicitly framed her claims under § 1981, her working conditions claim can then be based only on disparate treatment, which "refers to deliberate discrimination in the terms or conditions of employment." Munoz, 200 F.3d at 299. In support of this claim, Gray asserts that statistics show there are "black jobs" and "white jobs," and she appears to argue that these segregated job classifications are furthered by the use of subjective and arbitrary criteria in employment decisions.[10]

While statistical evidence is common in so-called "pattern or practice cases" (class actions alleging disparate treatment), an individual plaintiff can also utilize such evidence to demonstrate intentional discrimination.

> The plaintiff may establish a prima facie case of disparate treatment using statistics alone if the statistics show a gross disparity in the treatment of workers based on discriminatory factors. However, if the plaintiffs' [sic]statistical evidence is insufficient alone to establish a prima facie case of disparate treatment, the plaintiff may combine the statistical evidence with historical, individual, or circumstantial evidence.

Trevino v. Holly Suguar Corp., 811 F.2d 896, 902 (5th Cir. 1987) (internal quotations and citations omitted); see also Krodel v. Young, 748 F.2d 701, 710 (D.C. Cir. 1984) (stating that, for individual disparate treatment plaintiffs, the Supreme Court "has pointed out that [statistical] evidence is admissible and may be helpful, though ordinarily not dispositive").

In this case, Gray's statistics that African Americans are concentrated in the minimally skilled jobs are derived from the deposition of William Boykin, a plaintiff pursuing his own action

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[10] Gray doe not expressly characterize her working conditions claim as such. However, this circuit has held consistently that claims of pro se appellants are liberally construed. See, e.g., United States v. Glinsey, 209 F.3d 386, 392 n.4 (5th Cir. 2000); Chriceol v. Phillips, 169 F.3d 313, 315 n.2 (5th Cir. 1999).

against EOI. Defendants argue that these statistics are not admissible in this case because the numbers are unsubstantiated. We do not decide this issue because we agree with the district court's assessment that the evidence "does not prove [Gray], individually, has suffered discrimination." That the majority of employees in the professional positions are white does not ineluctably lead to an inference of intentional discrimination, establishing a prima facie case. Gray has not presented any evidence linking that disparity with racial animus (which adversely affected her employment) and thus fails to demonstrate a prima facie case of disparate treatment.

Gray also asserts that the 1996 EEO-1 reports submitted by EOI to the Equal Employment Opportunity Commission demonstrate discriminatory intent. We do not agree. These reports illustrate the racial composition in the various positions at EOI, and again, Gray has not demonstrated that the numbers were the result of invidious bias, as required by a disparate treatment claim.

Thus, Gray has failed to create a genuine issue of intentional discrimination in her working conditions claim, and summary judgment was appropriate in this regard.

IV. CONCLUSION

For the above stated reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JANICE GRAY **PLAINTIFF**

VS. **CIVIL ACTION NO. 5 : 99CV62BN**

ENTERGY OPERATIONS, INC.,
DON HINTZ, MIKE BAKARICH,
JOSEPH HAGAN, AND MARY SEE **DEFENDANTS**

FINAL JUDGMENT

In accordance with the Opinion and Order entered this day granting the motion of defendants for summary judgment, Plaintiff's claims are all hereby dismissed with prejudice.

SO ORDERED this the 2nd day of March, 2000.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED

001757 FEB 27 2001

OFFICE OF THE CLERK

No._____

In the
Supreme Court of the United States

JANICE GRAY, Petitioner

-v-

ENTERGY OPERATIONS, INC., Respondent

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDICES
(PETITION FOR WRIT OF CERTIORARI)

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38 pp

IN THE UNITED STATES DISTRICT COURT
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SO ORDERED this the 2nd day of March, 2000.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW the Defendants, Entergy Operations, Inc. ("EOI"), Don Hintz, Mike Bakarich, Joseph Hagan and Mary See (hereafter collectively referred to as Defendants), and move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to grant summary judgment to the Defendants, against the Plaintiff, Janice Gray, because there are no material facts in dispute, and Defendants are entitled to judgment as a matter of law, and as cause therefore state the following:

1. Janice Gray filed this action against the Defendants, alleging that she was discriminated against on the basis of her black race, in violation of 42 U.S. C. §1981. The discriminatory actions that she alleges in her Complaint concern not being promoted to the positions of Site Administrative Programs Coordinator, Administrative Coordinator, Senior Secretary, Secretary III, Senior Procurement Specialist and Secretary. She has withdrawn her claim with regard to all positions other than Secretary III and Site Administrative Programs Coordinator. Although she met the

minimum qualifications for the latter position, Karen Rucker, a white female, also met the minimum qualifications and she was chosen. Ms. Rucker had many additional qualifications that Ms. Gray die not have, which made her a better candidate, and it was a business decision by the interviewing panel that she should fill that position. Ms. Gray cannot prove that this legitimate nondiscriminatory rationale was pretext for discrimination. With regard to the position of Secretary III, a black female was promoted to fill the position, and therefore Ms. Gray cannot prove a prima facie case of race discrimination.

2. Ms. Gray also alleged in her interrogatory responses and depositions that she was not promoted to the positions of Office Services Supervisor and Senior Procurement Specialist in September 1999. Ms. Gray never amended her complaint to include those promotions, and therefore they are not property before this court. Even if she had, the person who was chosen for the Office Services Supervisory position is a black female, and Ms. Gray therefore cannot prove a prima facie case, not pretext to prove her claim of racial discrimination. A white female was chosen for the position of

Senior Procurement Specialist, but EOI made the legitimate, nondiscriminatory business decision to promote her because her qualifications for the position exceeded those of Ms. Gray's. Ms. Gray cannot prove that this decision was a pretext for discrimination.

3. Ms. Gray alleges that she has been discriminated against in her pay by receiving less than white employees in her job classification. Because Ms. Gray, whose title is Office Services Assistant, is the only employee at Grand Gulf in that classification, she has no similarly situated non-minority employees with which to compare herself, and she therefore cannot prove a prima facie case of race discrimination. Nor does she have properly compiled statistics to prove such disparity, or to prove that any disparity that may exist is a pretext for discrimination.

4. Ms. Gray alleges that she has been discriminated against with regard to her working conditions, because she alleges that Grand Gulf maintains, "black jobs" and "white jobs." However, she has no properly compiled statistics to prove this claim, and, since she is the only employee in her job classification, she cannot prove that

she is in a "black job." Moreover, working within a "black job," if such even exists, is not an adverse employment action that would afford an employee a cause of action by stating a prima facie case of discrimination.

5. Ms. Gray alleges that she was discriminated against by being ranked a "nine" for one year, which was the lowest rank available under the ranking system in affect in 1996. However, receiving a poor evaluation is also not an adverse employment action that would afford an employee a cause of action, especially since she suffered no adverse ramifications from ranking, i.e. she received a pay increase that year, she was not placed on an improvement plan, and she was not terminated no threatened with termination because of it.

6. Ms. Gray has alleged discrimination based on receiving subjective performance appraisals. However, the facts show that she did receive objective evaluations and even if she had not, without other evidence indicating that the subjective evaluations are a mask

or a pretext for discrimination, she cannot state a claim for discrimination.

7. Ms. Gray has not alleged nor proven that the discrimination she alleges is a continuing violation, and therefore this Court should not consider any discrimination outside the three year statute of limitation period.

8. All individual defendants should be dismissed, because Ms. Gray has no evidence of individual intent on their parts to discriminate against her with regard to her promotions. She alleges in her Complaint no action by them with regard to any of her other claims.

9. Attached to this Motion and incorporated herein are the Affidavit of James M. Cooley, and all exhibits and deposition excerpts referenced in the Memorandum in Support of this Motion.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that this Court grant this Motion for Summary

Judgment, dismiss this case with prejudice, and award to Defendants their cost and attorney fees.

Respectfully submitted,

ENTERGY OPERATIONS, INC.
DON HINTZ, MIKE BAKARICH,
JOSEPH HAGAN and MARY SEE

DOUGLAS E. LEVANWAY, BAR NO. 1206

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OPINION AND ORDER

This cause is before the Court on the following motions: (1) Motion of Defendants for Summary Judgment, and (2) Plaintiff's Motion to Strike the affidavit of James Cooley. The Court has considered the motions, responses and all supporting and opposing memoranda. The Court finds that the motion to strike should be denied and that the motion of Defendants for summary judgment is well taken and should be granted.

I. Background

Plaintiff, a black female, has worked for Defendant Entergy Operations, Inc. ("Entergy") and its predecessors in interest at the Grand Gulf Nuclear Station in Port Gibson, Mississippi ("Grand Gulf facility") since 1978. She has held a variety of positions such as Clerk Typist, Night Shift Supervisor, and Office Services Coordinator. Plaintiff filed this lawsuit on March 12, 1999, alleging

racial discrimination in violation of 42 U.S.C. §1981. The complaint contains the following causes of action:

(1) failure to promote Plaintiff on the basis of race,

(2) payment of disparate wages to Plaintiff on the basis of race, and

(3) establishment of racially discriminatory working conditions by creating "white jobs" and "black jobs."

In particular, the complaint alleges that Plaintiff was denied promotions in November 1996, February 1997, April 1997, November 1997 and January 1998. She further contends that she was paid less than her white co-workers. Finally, she alleges that the system Entergy uses for classifying positions, and hiring for those position, has created a situation in which certain jobs are held only by whites and certain ones are held by blacks.

Defendants have moved for summary judgment asserting that the evidence in the record does not present a genuine issue of material fact as to any of Plaintiff's claims. Plaintiff has filed a motion to strike the affidavit of James Cooley, which Defendants attached as an exhibit to the summary judgment motion.

II. The Motion to Strike

Plaintiff has moved to strike the affidavit of James Cooley. Plaintiff first argue that the affidavit should be striken because therein Cooley, the Manager of Human Resources for Grand Gulf Nuclear Station, testifies to things that pre-date his employment at the Grand Gulf facility. Even though he may have no first hand knowledge of events that pre-date his employment, the Court finds that Cooley has testified only to the contents of Plaintiff's personal records which are certainly within his personal knowledge, given his position. See FDIC v. Patel, 46 F.3d 482, 484 95th Cir. 1995); Federal Sav. & Loan Ins. Corp. v. Griffin, 935 F.2d 691, 702, (5th Cir. 1991).

Plaintiff next agrues that the Cooley affidavit should be stricken because the personnel records which support Cooley's testimony were not disclosed to plaintiff in discovery. However, as the supplement pre-discovery disclosures of Defendants indicate, Defendants did disclose the personnel records to Plaintiff. Defendants did not provide Plaintiffs with a copy of the records, but did disclose them as a potential source of discovery and stated that copies were not provided due to the voluminous nature of the records. Defendants clearly stated that the records would be made available for review upon Plaintiff's request. Plaintiff apparently never requested to view the records. Therefore, Plaintiff's motion to strike is denied.

III. The summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the records in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to

support the non-moving party's claim. Id. at 323-324. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, ... since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Ser. Corp. v. Poster exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962). However, "summary judgment should be granted ... when the nonmoving party fails to meet its burden to come forward with facts and law demonstrating a basis for recovery that would support a jury verdict." Little v. Liquid Air Corp., 73 F.3d 1069, 1071 (5th Cir. 1994).

A. The Analytical Framework

Generally in cases involving employment discrimination, the plaintiff has the initial burden of establishing a prima facie case of discrimination. Rhodes v. Guberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996) (applying the "McDonnel Douglass-Burdine" analysis and citing Texas Dep't. of Community Affairs v. Burdine. 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)). In order to prove a prima facie case of race discrimination, the plaintiff must show that she suffered an adverse employment action due to her race. See Chaney v. New Orleans Pub. Facility Management, 179 F. 3d 164, 167 (5th Cir. 1999); Mattern v. Eastman Kodak, 104 F.3d 702, 705-07 (5th Cir. 1997). The burden then shifts to the Defendant "to proffer a legitimate, nondiscriminatory reason for the challenged employment action," which requires presentation of evidence that, if believed by a jury, would lead to a finding that there was no discriminatory intent. Rhodes, 75 F.3d at 992-93. "The defendant need not persuade the court that it was actually motivated by the proffered reasons." Burdine, 450 U.S. at 254, 101 S. Ct. at

1089. The proffer of the reason is enough to shift the burden back to the plaintiff. Id. Finally, once the defendant has met its burden, the burden shifts back to the plaintiff to prove that the proffered reason for termination was merely pretextual. Rhodes, 75 F.3d at 993.

B. Plaintiff's Claims for Failure to Promote

In her complaint, Plaintiff alleges that she was denied the following promotions because of her race: Site Administrative Programs Coordinator in November 1996, Administrative Coordinator in February 1997, Senior Secretary and Secretary III in April 1997, Senior Procurement Secretary in November 1997, and Secretary in January 1998. However, since filing the complaint, Plaintiff has dropped all of these claims except for Site Administrative Programs Coordinator in November 1996.

In fact, in her response to the motion for summary judgment, Plaintiff included a motion under Rule 41 of the Federal Rules of Civil Procedure for voluntary dismissal of all the others. The Court finds that motion well taken. However, in her deposition, Plaintiff for the first time raised a claim for failure to promote her to the

position of Procurement Specialist III in September 1999. This new claim was obviously not contained in the original complaint, and Plaintiff has not amended her complaint to include it. Plaintiff's request for dismissal of those claims contained in the complaint which she admits she can not support does not cure her failure to include all her claims in the complaint. Rule 8 of the Federal Rules of Civil Procedure requires a complaint to contain "a short and plain statement of the claim." The inclusion of some similar claims does not necessarily give the defendants notice of the claims asserted against them. This is especially true in a case such as this, where Plaintiff alleged specific instances of Defendants' failure to promote her and failed to mention the claims she presently seeks to pursue. Defendants had no notice of any claims beyond those contained in the complaint until Plaintiff's deposition. Also significant is the fact that Plaintiff has not attempted to amend her complaint, but even if Plaintiff did seek to amend her complaint, it is unlikely the Court would allow such an amendment at this late stage in the litigation in order for Plaintiff to avoid summary judgment.

The Court does address, however, Plaintiff's last remaining claim for failure to promote regarding Site Administrative Programs Coordinator in November 1996. To prove a prima facie case of racial discrimination in a failure to promote claim, the plaintiff must demonstrate (a) she is a member of a racial minority; (b) that she was qualified for a position and applied for it; (c) that she was not hired to the position; and (d) that a member of the racial majority was hired to the position or that the employer continued to seek applications with the Plaintiff's qualifications. See Grimes v. Texas Dept. of Mental Health, 102 F.3d 137, 140 (5th Cir. 1996); Meineck v. H&R Block of Houston, 66 F.3d 77, (5th Cir. 1995). Plaintiff has established a prima facie case. Defendants confess as much. Plaintiff is black, a racial minority. She has established that she was qualified for the position of Site Administrative Programs Coordinator when it was offered in November 1996. She was clearly not hired to the position. Finally, not only were additional applications accepted for the position, it was awarded to a white female, Karen Rucker.

The burden, therefore, shifts to Defendants to offer a legitimate, nondiscriminatory reason for not hiring Plaintiff to the

position. Rhodes, 75 F.3d at 992-93. Defendants give two reasons for why they hired Rucker over Plaintiff: (1) although Plaintiff met the minimum qualifications, Rucker was more qualified, and (2) Rucker was known to be compatible with the person for whom she would be working, Joseph Hagan, because he had worked with her before and knew of her capabilities.

Regarding the first reason given, clearly, the fact that those interviewing applicants for the position found Rucker to be more qualified than Plaintiff is a legitimate nondiscriminatory reason for choosing the white applicant. Defendants assert that Rucker's background and the fact that she spoke several different languages made her a more desirable candidate.

Therefore, the burden shifts back to Plaintiff to prove that the reason given by Defendants for not hiring her is merely pretextual. The United States Supreme Court has stated in order to prove pretext, the Plaintiff must prove (1) that the reasons given by Defendant were false and (2) that the real reason was discrimination, neither of which Plaintiff has proven. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) discussing Burdine).

Plaintiff has failed to prove that Rucker's previous work experience and fluency in several foreign languages, which Defendants assert made Rucker a much more appealing candidate for the position, did not in fact make Rucker more qualified for the position. Plaintiff argues that the reason given by Defendants for not hiring her is pretextual because she met the qualifications for the position as they were originally posted and Defendants changed the qualifications and re-posted the position without hiring her. However, Plaintiff confesses that Defendants changed the qualifications to make them match Rucker's qualifications, not simply because she was white. Plaintiff claims, without any supporting evidence, that Rucker still did not meet the minimum qualifications because she did not have proof of a high school equivalent education. This is refuted by Defendants with evidence that Rucker did have proof of a high school equivalent education, and Plaintiff has presented no evidence to the contrary.

Even if Plaintiff proved pretext as to the qualifications reason given by Defendants for not hiring her, Defendants gave the alternate reason of personal compatibility. Plaintiff has done nothing to prove

that this reason was pretextual, and Defendants cite other courts which have recognized personal compatibility as a legitimate nondiscriminatory reason for making employment decisions. See Ramey v. Bowsher, 915 F.2d 731, 735-36 (D.C. cir. 1990); Krulick v. Board of Educ., 781 F.2d 15, 21 (2nd Cir. 1986).

The only evidence Plaintiff has that discrimination was the real reason she was not hired is her own subjective feeling that she has been discriminated against, which is insufficient to avoid summary judgment. See Grimes, 102 F.3d at 139-40; Lawrence v. University of Texas Med. Branch at Galveston, 163 F.3d 309, 313 (5th Cir. 1999). For all these reasons, the Court finds that Defendants are entitled to summary judgment on Plaintiff's claims for failure to promote.

C. Plaintiff's Disparate Wages Claim

Plaintiff also claims that she has been paid disparate wages on the basis of her race. "To establish a prima facie case of racial discrimination with respect to compensation, the plaintiff must show that he was paid less than a member of a different race was paid for

work requiring substantially the same responsibility." Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1074 (5th Cir. 1981). Plaintiff in this case has not presented any evidence showing that she was paid any less than her white co-workers.

Plaintiff has provided evidence that she asserts proves that the procedure used by Entergy to establish starting pay, and to grant merit pay raises, was arbitrary. Plaintiff has even presented evidence that people with different position titles, but with the same job responsibilities, were paid at different rates. However, even if Plaintiff has proven that the procedure for determining pay rates is arbitrary, she has pointed to no evidence in the record which indicates that her, or any other black employee's arbitrary pay rate was any less than the arbitrary pay rates of white employees with the same job responsibilities. Defendants are, therefore, entitled to summary judgment on Plaintiff's disparate wages claim.

D. Plaintiff's Discriminatory Working Conditions Claim

Finally, Plaintiff claims that she was subjected to discriminatory working conditions. In her complaint, she claims that

the criteria used by Entergy for awarding merit pay raises and promotions and determining job classifications has created a system of "white jobs" and "black jobs." It is not completely clear what sort of claim this is. It could be construed as a disparate impact claim, which is cognizable under Title VII. Such a claim does not require intention discrimination and may be based on statistical disparities that disadvantage the members of a protected class. See Munoz v. Orr, No. 97-50736, 2000 WL 6156 (5th Cir. Jan. 5, 2000). However, Plaintiff expressly termed her claim as a one for a violation of § 1981, which requires a showing of intentional discrimination. National Ass'n of Gov't Employees v. City Public Serv. Bd. of San Antonio, 40 F.3d 698, 714 (5th Cir. 1994) (citing General Bldg. Contractors Ass'n. Inc. v. Pennsylvania, 458 U.S. 375, 390-92, 102 S. Ct. 3141, 3158 (1982)).

Plaintiff has provided some statistical evidence that the high-skilled jobs at Grand Gulf Facility are held predominately by white employees, while the low-skilled jobs are held predominately by blacks. However, she has not shown how this evidence proves that she has been discriminated against. Although statistical evidence

may be probative of discriminatory intent, the particular evidence presented by Plaintiff, without more, is not sufficient to avoid summary judgment. The least Plaintiff needs in order for her statistical evidence to be sufficient to created a fact question is to "draw a comparison between the prcentage of minorities in the workforce and the percentage of qualified minorities in the relevant candidate pool." Scales v. Slater, 181 F.3d 703, 708 n. 5 (5th Cir. 1999); See also EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1184 (5th Circ. 1996). Plaintiff has stated, without citing any authority, that the general population of the counties surrounding the Grand Gulf Facility is predominately black.[2] However, she does not offer any evidence of the correlation, if any between the ratios of the black-white populations and the blacks qualified to hold the jobs in question and the whites that are presently holding them.

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[2] The Court could, if asked, take judical notice of the census records to prove this fact, but has not been asked to do so.

Kodak, 104 F.3d 702, 705-07 (5th Cir. 1997). The Court thus finds that Defendants are entitled to summary judgment on Plaintiff's discriminatory working conditions claim.

In addition, Plaintiff's statistical evidence does not prove she, individually, has suffered discrimination either intentionally or by disparate impact. She does not claim to have been qualified for the high-skilled jobs which she asserts are predominately held by white employees. Plaintiff's subjective beliefs that she was a victim of discrimination are insufficient to avoid summary judgment. See Grimes, 102 F.3d at 139-40; Lawrence v. University of Texas Med. Branch at Galveston, 163 F.3d 309, 313 (5th Cir. 1999). Plaintiff has failed show, or even allege, that she suffered any sort of adverse employment action, which is a general requirement for maintaining a cause of action based on discrimination. See Mattern v. Eastman Kodak, 104 F.3d 702, 705-07 (5th Cir. 1997). The Court thus finds that Defendants are entitled to summary judgment on Plaintiff's discriminatory working conditions claim.

V. Conclusion

For the foregoing reason:

IT IS THEREFORE ORDERED that the motion of Defendants for summary judgment is hereby granted.

IT IS THEREFORE FURTHER ORDERED that Plainfiff's motion to strike the affidavit of James Cooley is hereby denied.

A separate final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure will be entered this day.

SO ORDERED this the __2nd__ day of March 2000.

____/s/__William H. Barbour, Jr._____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JANICE GRAY
PLAINTIFF

VS.

CIVIL ACTION NO. 5.99 CV62BN

ENTERGY OPERATIONS, INC.,
DON HINTZ, MIKE BAKARICH
JOSEPH HAGAN, AND MARY SEE
DEFENDANTS

FINAL JUDGMENT

In accordance with the Opinion and Order entered this day granting the motion of defendants for summary judgment, Plaintiff's claims are all hereby dismissed with prejudice.

SO ORDERED this 2nd day of March, 2000.

/s/ William Barbour, Jr.

UNITED STATES DISTRICT JUDGE